IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 2633 OF 2005

Cedric D'Silva ... Petitioner

V/s.

Union of India & Ors. ... Respondents

Mr. Mohan Bir Singh for petitioner.
Mr. C.U. Singh with Mr. Abhay Kulkarni with Ms. Vishakha Vaswani i/b. V.V. Juris for respondent No. 4.

CORAM : F.I. REBELLO &
ANOOP V. MOHTA,JJ.
DATED : 22nd November, 2006

P.C.

. Rule. Heard forthwith.

2. The services of the petitioner came to be terminated by communication dated 18.01.2005, relying on clause (20) of the letter of appointment dated 30th September, 1992. The petitioner was described as Sr. Commander.

. By letter dated 30th September, 1992 the petitioner had been offered the post of First Officer. One of the clauses in the letter of appointment was as under:-

> "20. After confirmation, the Company would be entitled to terminate your services without assigning any reason, by giving you three months' notice in writing or by payment of three months' salary in lieu of such notice. In the event your desiring to leave the services of the Company at any time after confirmation, you shall give to the Company three months' notice in writing provided that the Company may, at its sole discretion, waive such notice."

3. By letter of 23rd March, 1999 the petitioner was informed that he was promoted as Senior Commander with effect from 26th April, 1998. By communication dated 30th November, 2004 the petitioner was informed that he was promoted to the next higher Management grade (Grade C1) where the petitioner shall perform training duties as Check Pilot with effect from acceptance of the letter. To that communication dated 30th November, 2004 and letter of 17th December, 2004, the petitioner informed the respondents that he was agreeable to carry out the additional duties of a Check Pilot in addition to his normal and primary duty of line flying. The petitioner further set out that he was not agreeable to any change in his status from a "workman" to the "management cadre" at present. He also informed the Management that if the intention behind the issuance of the letters was to change his status as a workman, the same was not acceptable and

Management was to act accordingly. In other words he was not agreeable to the promotion. It is after this letter of 27th December, 2004 that the letter terminating services dated 18.01.2005 came to be issued.

4. The matter was taken up in conciliation and a failure report was submitted. The appropriate Government thereafter by undated letter rejected the claim of the petitioner. We may gainfully refer the said letter.

> "Sir,
>
> . I am directed to refer to the Failure of Conciliation Report No. B-ALC-I/8(9)/2005 dated 28.2.2005 from the Assistant Labour Commissioner, Mumbai on the above subject and to say that prima facie this Ministry does not consider the dispute fit for adjudication for the following reasons:
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> **"Capt. Cedric D'silva, Sr. Commander, Jet Airways not being a workman in terms of Section 2(s) of the ID Act, in view the duties assigned to him, no ID subsists.""**

. This order is subject matter of the present writ petition.

5. On behalf of the petitioner, the learned counsel relies on the following judgments to contend

that so far it has been held that Pilot is workman and therefore it was not open to the Appropriate Government to decide on facts that the petitioner herein is not a workman within the meaning of Section 2(s) of the ID Act, as he had accepted the offer of appointment as check pilot subject to his communication dated 30th November, 2004 and 17th December, 2004.

i. The award of the National Industrial Tribunal, Lucknow published in the Gazette of India, Part II, Section 3, Sub-section (ii) of Thursday, March 20, 1958 between The **Indian Airlines Corporation V/s. The Air Corporation Employees' Union and Ors.**

ii. The award of the Central Government Labour Court No. II, in LC No. 2/44 of 1997 between **Cap. Yashovijay Parmar V/s. N.E.P.C. Airlines** dated 30th July, 1998.

iii. The Complaint No. NTB-7 of 2003 and Complaint No. NTB-8 of 2003 which was before National Industrial Tribunal between **M.R. Fernandes & M.R. Wadia V/s. Air India Ltd.** decided on 5th September, 2003.

iv. Paragraph 32 in reference No. NTB-01/1990 between Indian Airlines and their workmen decided on 6th September, 2004, where reference is made to the award of Justice Shri Bind Wasini Prasad dated 19.02.1958, which took view that Commander and Co-pilots were workmen and only Executive Pilots were not treated as workmen.

v. A judgment of Division Bench of this Court in the case of **Kenneth Khan V/s. Air India Ltd. & Ors.** (2005) 3 CLR 48 and others judgment which has taken a view whether Pilot is workman or not workman will not depend upon mere designation but on the work that such Pilot would be doing. In other words, it is a question of fact.

. Reliance is also placed on a judgment of Apex Court in **Sharat Kumar V/s. Govt. of NCT of Delhi & Ors., AIR 2002 SC 1724** and a judgment in **Rajastan State Road Transport V/s. Krishna Kant and Ors. 1995 Lab. I.C. 2241** and more specifically proposition(4) of para 32 of the said judgment to contend that, in exercising power under Section 12(5) of the ID Act, it is not open to the Appropriate Government to decide and investigate as to whether the person is workman and/or not workman. That exercise can only be done by the appropriate Industrial Tribunal on a reference made to it.

. Even otherwise, it is submitted that the communication would disclose that this was only prima facie finding. In other words, it would have been open to the petitioner to lead evidence to show that in-fact his primary duties are as a workman. For all the aforesaid reason, it is submitted that this Court ought to interfere with the said order.

6. On behalf of respondent employer, the learned Counsel submits that the failure report which has been annexed as Exhibit "O" dated 28.02.2005 is not the actual failure report, but independently another

failure report has been sent by the Conciliation Officer. Respondent No. 1 is represented before us. No other affidavit is filed to point out that any other failure report has been submitted, which could have been perused by this Court. It is, however, submitted on behalf of respondent employer that documentary evidence would indicate that on promotion, the petitioner was appointed as a Check Pilot and the post of Check Pilot is to supervise and to check duties of the other pilots on the board and apart from that considering the various statutory provisions in the various enactments, a person who is commander and/or Check Pilot on a flight, cannot be said to be a workman. In these circumstances, it is submitted that this Court ought not to interfere with the decision taken by the appropriate Government.

7. Under Section 12(5) of the ID Act, if the appropriate Government on consideration of the report forwarded by the Conciliation Officer is of the opinion that no industrial dispute exists it may refuse to make reference. In the instant case, as we have pointed out earlier the appropriate Government has prima facie opined that petitioner is not a workman and consequently rejected the claim of

petitioner and has refused to make a reference. We have pointed that an order under Section 12(5) of the I.D. Act, though partakes of an administrative order nonetheless, it is still open to this Court to interfere with the said order, if that order discloses non-application of mind or satisfaction is based on irrelevant material or not considering relevant material or without considering the law laid down by Supreme Court and High Courts. We are prima facie of the opinion that the decision of the appropriate Government in rejecting the petitioner's case for reference discloses total non-application of mind.

8. In the light of that the impugned order is set aside. The matter as referred back to respondent No. 1 to reconsider the matter at any rate not later than eight weeks from a copy of the order being communicated by the petitioner to respondent No.1.

9. Rule made absolute accordingly. There shall be no order as to costs.

[F.I. REBELLO, J.]

[ANOOP V. MOHTA, J.]